

Wintz Motor Freight, Inc./Wintz Transportation Company/U.S. Trustee William Westphal and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 17 and Office and Professional Employees International Union, Local No. 5 and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 961. Cases 27-CA-7466, 27-CA-7591, 27-CA-7500, and 27-CA-7527

December 14, 1982

### DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On August 26, 1982, Administrative Law Judge Earle Dean V. S. Robbins issued the attached Decision in this proceeding. Thereafter, Respondent U.S. Trustee William Westphal filed exceptions<sup>1</sup> and a supporting brief. Charging Parties Teamsters Locals 17 and 961 and the General Counsel filed a response to Respondent Westphal's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order, as modified herein.

The only issue before us is whether U.S. Trustee William Westphal is an *alter ego* and successor in bankruptcy to Respondent Wintz.

On November 20, 1981, a consolidated complaint issued in the instant case. Subsequently, Respondent Wintz filed a bankruptcy petition. On March 20, 1982, the General Counsel filed an amended complaint alleging that U.S. Trustee William Westphal was, for remedial purposes only, an *alter ego* and successor to Respondent Wintz. Thereafter, Westphal filed an answer to the amended complaint denying that he was either the alternative *alter ego* or successor to Respondent Wintz and requested that he be dismissed as a respondent. Westphal did not otherwise participate in the proceeding before the Administrative Law Judge.

The Administrative Law Judge found that as a trustee-in-bankruptcy Westphal was the *alter ego* and successor to Respondent Wintz and according-

<sup>1</sup> No exceptions have been taken to the Administrative Law Judge's finding that the *alter ego* Respondents Wintz Motor Freight, Inc., and Wintz Transportation Company (collectively referred to as Respondent Wintz) committed a number of violations of Sec. 8(a)(5), (3), and (1) of the Act.

ly denied Westphal's request. Westphal has excepted to the Administrative Law Judge's finding, contending that as a United States trustee he is precluded from acting as a trustee-in-bankruptcy for Respondent Wintz. In addition, Westphal makes the undisputed factual allegation that Respondent Wintz is currently a debtor-in-possession under the voluntary reorganizational provisions of chapter 11 of the bankruptcy code. There is no trustee-in-bankruptcy. Charging Parties Teamsters Local 17 and 961 and the General Counsel filed responses requesting that the Board dismiss the complaint against U.S. Trustee William Westphal. We agree.

Accepting as true the undisputed allegations in Westphal's exceptions, we find that he is not an *alter ego*, a successor, or a trustee-in-bankruptcy to Respondent Wintz and we grant the parties' joint request to dismiss U.S. Trustee William Westphal as a respondent in this proceeding.<sup>2</sup>

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wintz Motor Freight, Inc., and Wintz Transportation Company, Commerce City, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 3:

"3. IT IS FURTHER ORDERED that U.S. Trustee William Westphal be, and he hereby is, dismissed as a respondent in this proceeding."

2. Substitute the attached notice for that of the Administrative Law Judge.

<sup>2</sup> In light of our dismissal of U.S. Trustee William Westphal as a respondent, we find it unnecessary to rule on his motion to reopen the record.

### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:  
To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT fail and refuse to meet and bargain with Office and Professional Employees International Union, Local No. 5, and with the Teamsters National Union Committee and/or International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 961, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 17, as the exclusive bargaining representatives of our employees in the respective appropriate unit with respect to wages, hours, and other terms and conditions of employment. The appropriate units are:

All office and clerical employees formerly employed by DMW and presently employed by the Employer at its Commerce City warehouse, but excluding General Office clerical employees, sales persons, guards, professional employees, confidential employees, all over-the-road drivers, city drivers and warehouse employees, and casual part-time employees and supervisors as defined in the Act.

All over-the-road drivers, city drivers, dockmen and warehouse employees employed by employers and employer-members of associations who are signatory to the Teamsters National Master Freight Agreement, but excluding office clerical employees, sales persons, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT fail and refuse to process grievances filed by the collective-bargaining representatives of our employees in the appropriate units described above.

WE WILL NOT fail and refuse to provide information requested by said collective-bargaining representatives which is relevant and necessary to the performance of their representative obligations.

WE WILL NOT unilaterally discharge employees, subcontract unit work, or otherwise change the wages, hours, and other terms and conditions of employment of the aforementioned unit employees without prior bargaining with the appropriate above-named Unions or

any other labor organization our employees may select as their exclusive bargaining representative.

WE WILL NOT discourage membership in the above-named Unions, or any other labor organization by discharging, and refusing to accept employment applications from, or to rehire or consider for rehire, our represented employees while retaining our unrepresented employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL, upon request, recognize and bargain collectively with Office and Professional Employees International Union, Local No. 5, and with the Teamsters National Union Committee and/or Teamsters Local 961 and Teamsters Local 17, respectively, as the collective-bargaining representative of our employees in the above-described bargaining units.

WE WILL furnish Teamsters Local 17 and Teamsters Local 961 the information requested by them respectively on August 3, 1981, and August 4, 1982.

WE WILL reinstitute our local cartage operation as it existed on July 31, 1981.

WE WILL offer all employees in the above-described appropriate units who were discharged on July 31, 1981, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay or benefits they may have suffered as a result of the discrimination against them, plus interest.

WINTZ MOTOR FREIGHT, INC./-  
WINTZ TRANSPORTATION COMPANY

### DECISION

#### STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge: This case was heard before me in Denver, Colorado, on June 2, 1981. The charge in Case 27-CA-7466 was filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 17, herein called Teamsters Local 17, and served on Wintz Motor Freight, Inc., herein called Respondent, on August 14, 1981. The charge in Case 27-CA-7500 was filed by the Office and Professional Employees International Union, Local No. 5, herein called OPEIU Local 5, and served on Respondent on September 1, 1981. The charge in Case 27-CA-7527 was filed by International

Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 961, herein called Teamsters Local 961, and served on Respondent on September 21, 1981. Separate complaints issued in each of said cases on September 30, 1981, alleging that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, herein called the Act. Amendments to each of said complaints issued on November 19, 1981.

The charge in Case 27-CA-7591 was filed by Teamsters Local 17 and served on Respondent on October 29, 1981. On November 19, 1981, a complaint issued in Case 27-CA-7591 alleging that Respondent had violated Section 8(a)(1) and (5) of the Act and an order issued consolidating Case 27-CA-7591 with Case 27-CA-7466. On November 20, 1981, a second order consolidating cases issued consolidating Cases 27-CA-7466 and 27-CA-7591 with Cases 27-CA-7500 and 27-CA-7527. On April 22, 1982, second amendments issued to all of said complaints. On May 10, 1982, amended complaints issued in each of said cases and on May 20 said complaints were amended to allege that for remedial purposes only the U.S. Trustee, William Westphal, is, in the alternative, an *alter ego* and successor to Respondent. On May 28, 1982, said trustee filed an answer to the complaint denying that he is either the alternative, *alter ego*, or successor to Respondent as alleged in said amendment, alleging that he is not a proper party to these proceedings, and requesting that he be dismissed as a Respondent herein.<sup>1</sup>

The basic issues herein are:

1. Whether Respondent violated Section 8(a)(1) and (3) of the Act by discharging the terminal clerical employees, the over-the-road drivers, and the city drivers and dockworkers without advance notice to or bargaining with their respective collective-bargaining representatives.
2. Whether Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to accept and process grievances filed by OPEIU Local 5 relating to said discharges of the terminal clerical employees.
3. Whether Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide information requested by Teamsters Local 961 and Teamsters Local 17 which was necessary and relevant to the processing of grievances relating respectively to the discharge of the over-the-road drivers and the city pickup and delivery employees.
4. Whether Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting its local cartage work which had previously been performed by its city drivers and dockworkers.
5. Whether Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to meet and bargain with Teamsters Local 17, Teamsters Local 961, and

<sup>1</sup> Trustee Westphal's motion is hereby denied, inasmuch as the Board has found that a trustee-in-bankruptcy is the *alter ego* of a bankrupt employer and a successor in law *vis-a-vis* the Union. *Imperial Hospital; Donald W. Henry, Trustee in Bankruptcy*, 257 NLRB 581 (1981); *Oxford Structures, Ltd., Debtor-in-Possession*, 245 NLRB 1180, 1181 (1979); *Jersey Juniors, Inc.*, 230 NLRB 329, 332 (1977); *Cagle's, Inc.*, 218 NLRB 603, 604 (1975); *Marion Simcox, Trustee of Wagner Shipyards and Marina, Inc.*, and *Stateside Service, Inc., d/b/a Stateside Shipyard and Marina, Inc.*, 178 NLRB 516, 518 (1969).

OPEIU Local 5 with regard to the wages and hours and other terms and conditions of employment in the unit represented by each of them.

6. Whether Respondent violated Section 8(a)(1) and (3) of the Act by refusing to accept employment applications from, consider for rehire, or to reemploy said discharged terminal clerical employees, over-the-road drivers and city drivers and dockworkers.

Upon the entire record, including my observation of the witnesses, and after due consideration of the brief filed by the General Counsel,<sup>2</sup> I make the following:

## FINDINGS OF FACT

### I. JURISDICTION

Denver Midwest Motor Freight, herein called DMW, a corporation, for several years immediately prior to April 1, 1980, maintained an office and place of business at Commerce City, Colorado, where it was engaged in the transportation of freight by truck. DMW, in the course and conduct of said business operations, annually derived gross revenue in excess of \$50,000 from the transportation of goods and freight in interstate commerce.

Respondent Wintz Motor Freight is now, and at all times material herein has been, a corporation with a principal place of business at St. Paul, Minnesota. Respondents Wintz Motor Freight, in the course and conduct of its business operations, has in the past and will annually derive gross revenue in excess of \$50,000 from the transportation of goods and freight in interstate commerce. Respondent Wintz Motor Freight and Wintz Transportation Company entered into a contract to purchase assets of DMW, including personal property and other trade assets of the business operations of DMW, effective April 1, 1980, and, thereafter, as set forth below, Wintz Motor Freight engaged in substantially the same business operations formerly engaged in by DMW at Commerce City, Colorado.

Upon the pleadings and the evidence, I find that DMW has been and Respondents Wintz Motor Freight and Wintz Transportation Company are now, and at all times material herein each has been, an employer en-

<sup>2</sup> Respondent made no appearance on the record nor did it submit a post-hearing brief. However, on July 1, 1982, Respondent filed what was essentially a motion to stay the proceedings herein. On July 9, 1982, the General Counsel filed an opposition to said motion. It appears that Respondent's motion is based solely on an automatic stay issued by the bankruptcy court in the Chapter 11 reorganization proceedings involving Wintz Motor Freight and Wintz Transportation Co. As argued by the General Counsel:

The automatic stay provision contained in section 362 of the Code expressly provides in subsection (b)(4) and (5) that the filing of a bankruptcy proceeding shall not stay—

(4) . . . the commencement or continuation of an action or proceeding by a government unit to enforce such governmental unit's police or regulatory power.

(5) . . . the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

Since the Board's proceedings fall within the purview of these exceptions, Respondent's motion is denied.

gaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION

Upon the pleadings and the evidence, I find that the Teamsters National Freight Industry Negotiating Committee, Teamsters Local 17, Teamsters Local 961, and OPEIU Local 5 each is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Facts

For a number of years, both DMW and Wintz Motor Freight have been signatory to the "National Master Freight Agreement covering over-the-road and local cartage employees of private . . . contract and local cartage carriers" between named employers or associations of employers and the Teamsters National Freight Industry Negotiating Committee representing local unions affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Teamsters National Union Committee, and named local unions affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. DMW, Wintz Motor Freight, and Teamsters Local 961 are also parties to the Central States Over-the-Road Motor Freight Supplemental Agreement covering all over-the-road drivers and drivers-helpers employed by the employer-signatories to work within, into, and out of the Central States area, which includes Denver, Colorado, and Minnesota. DMW and Teamsters Local 17 are signatories to the Western States Area Pick-up and Delivery Local Cartage and Dock Workers Supplemental Agreement covering drivers employed by private common and contract carriers in a Western States area which includes the State of Colorado. All of said collective-bargaining agreements were effective by their terms for the period from April 1, 1979, to March 31, 1982. DMW was also signatory to a collective-bargaining agreement with OPEIU Local 5 effective from October 1, 1979, to October 1, 1982, covering its terminal clerical employees. The general office employees and the mechanics were not represented by a labor organization.

Respondent Wintz Motor Freight admits that it entered into a contract to purchase some of the assets of DMW, including personal property and other trade assets of the business operations of DMW effective April 1, 1980. That contract is not in the record.<sup>3</sup> However, the record does contain a copy of a termination agreement dated June 15, 1981, terminating said contractual obligations. The termination agreement was entered into by Howard E. Holdcroft, referred to as the seller, and DMW, Lee's Trucks, Inc., and Central Enterprise, Inc., collectively referred to as the selling entities, and George L. Wintz, Jr., referred to as the purchaser, and Wintz

Motor Freight, Inc., Wintz Truck Leasing, Inc. and Wintz Transportation Company, all Minnesota corporations, and Wintz Investment Company, a Minnesota general partnership, collectively referred to as the purchasing entities. George L. Wintz, Jr., herein called G. Wintz, signed said agreement both on his own behalf and on the behalf of Wintz Motor Freight and Wintz Transportation Company, as president of each.<sup>4</sup> This termination agreement recites *inter alia* that the said purchase agreement requires the purchase by certain of the purchasing entities and the sale by certain of the selling entities of substantially all of the assets of the selling entities subject to the prior approval of the Interstate Commerce Commission, herein referred to as ICC, and the lease of such assets by the purchasing entities during the period prior to approval by the ICC of the purchase thereof.

On March 14, 1980, Wintz Motor Freight, Inc., was granted temporary authority by the ICC to lease the operating rights and property of DMW. In April 1980, Wintz Motor Freight began operations out of the Denver facilities previously used by DMW, servicing the same geographical area and customers theretofore serviced by DMW, utilizing the same equipment and dispatch procedure as had DMW and employing the same terminal manager and supervisor of operations, dispatcher and dock foreman, and employees as had been employed by DMW. The only outward change was that the name on the trucks and the payroll checks and signs on the facility were changed from DMW to Wintz Motor Freight.

When Wintz Motor Freight commenced its Denver operations, it distributed a notice to each employee stating that Wintz Motor Freight was going to continue to operate in the same manner as had DMW and was desirous of retaining the DMW employees in its employ. It also adhered to the collective-bargaining agreements between DMW and the Union, paying wages, checking off union dues, processing grievances, and making benefits contributions as required under said collective-bargaining agreement. Further, the employees maintained their seniority acquired with DMW. In August 1980, the over-the-road drivers were required to fill out new application forms, undergo new physical examinations, and complete a new ICC written test.

On January 22, 1981,<sup>5</sup> a petition was filed with the ICC requesting leave to substitute Wintz Transportation Company as applicant for authority to purchase the interstate operating rights and property of DMW. During March, G. Wintz met with the employees. At this time, according to the testimony of city driver John Jones, whom I credit, G. Wintz said that Wintz Motor Freight was not a money-making proposition, that he was going to put it together with Wintz Transportation, which was part of his cartage outfit in St. Paul, so he could move funds from one company to the other and keep both companies operating.

Prior to March 30, the ICC determined that, as a condition to its approval of the purchase by Wintz Trans-

<sup>3</sup> That contract and other pertinent documents were subpoenaed by the General Counsel. The subpoena was not complied with nor was a motion to quash the subpoena filed.

<sup>4</sup> G. Wintz also signed the agreement as president of Wintz Truck Leasing, Inc., and as managing partner of Wintz Investment Company.

<sup>5</sup> All dates hereinafter will be in 1981 unless otherwise indicated.

portation Company of the DMW interstate operating rights and property, Wintz Transportation Company be required to submit an independent appraisal report to substantiate the purchase price for the equipment.<sup>6</sup>

On July 30, Respondent's director of industrial relations, Anthony Pazik, sent identical telegrams to Teamsters Local 961, Teamsters Local 17, and OPEIU Local 5, the body of which reads:

THE FOLLOWING NOTICE WENT CERTIFIED MAIL TO ALL YOUR MEMBERS WHO WERE INVOLVED IN THE TERMINATION OF THE INTERSTATE COMMERCE COMMISSION TEMPORARY AUTHORITY BETWEEN DENVER MIDWEST MOTOR FREIGHT AND WINTZ MOTOR FREIGHT. THIS IS FOR YOUR INFORMATION.

OUR SUPERVISORY PERSONNEL WILL BE CONTACTING YOU AS SOON AS POSSIBLE TO DISCUSS FUTURE OPERATIONS OF WINTZ MOTOR FREIGHT, IF ANY, WITHIN THE JURISDICTION OF YOUR LOCAL.

NOTICE READS:

PLEASE BE ADVISED THAT THE TEMPORARY AUTHORITY UNDER WHICH WINTZ MOTOR FREIGHT OPERATED DENVER MIDWEST MOTOR FREIGHT HAS BEEN RESCINDED BY THE INTERSTATE COMMERCE COMMISSION.

THEREFORE, RELUCTANTLY, EFFECTIVE JULY 31, 1981, THIS YOUR NOTICE OF TERMINATION FROM WINTZ MOTOR FREIGHT IN ACCORDANCE WITH THE APPROPRIATE PROVISIONS OF YOUR TEAMSTERS'S AGREEMENT.

YOUR SENIORITY DATE WILL IMMEDIATELY REVERT TO THE SENIORITY LIST OF DENVER MIDWEST MOTOR FREIGHT.

The notice, as quoted in the telegram, was distributed by Respondent on July 30 or 31 to all the over-the-road drivers, city drivers, and dock workers who had previously been in the employ of DMW. The record does not indicate whether Respondent sent an identical, or similarly worded, telegram to OPEIU nor whether the terminal clericals were given letters identical to those distributed to the dockworkers. However, the terminal clericals were also terminated effective July 31. The unrepresented mechanic and general office clericals were not terminated nor were the two over-the-road drivers, Max Ryan and Billy Bob Morris, hired after Respondent commenced operations out of the Denver terminal; and Wintz Transportation Company continued to abide by the terms of the collective-bargaining agreement as to Ryan and Morris. No prior notice was given by Respondent to either of the three unions of its intent to cease operations and to terminate employees.

On August 1, Wintz Transportation Company began operations utilizing the same Denver facilities and equipment previously used by Wintz Motor Freight, employing the same supervisory and management personnel, and servicing the same geographic area as had Wintz Motor Freight, without any hiatus in operations. By August 3,

new city drivers were hired. However, as late as September 22, the decals on the trucks read:

WINTZ  
MOTOR FREIGHT, INC.  
Operations of  
Denver Midwest Motor Freight, Inc.

Fred Barrett, one of the terminated over-the-road drivers, testified that he and several other over-the-road and city drivers spoke with Terminal Manager Phil Bock on Monday, August 3. According to Barrett's credited testimony, he asked Bock why they had been terminated. Bock told them that Respondent no longer had DMW operating authority, that they were DMW employees so they had been terminated as DMW employees. Barrett asked for a job application blank. Bock said, "I'm sorry, Fred. I can't give you an application. Mr. Wintz has told me that I am not to hire any former employees."

Bock then showed them a list of questions that he had asked G. Wintz during a telephone conversation on August 2 and the answers he had received. The questions related to hiring and use of equipment and the terminal. The answers included instructions that none of the terminated drivers was to be rehired, that city drivers would be obtained through Teamsters Local 17, that the Company would remain union and that the Company had determined that Ryan and Morris were Wintz employees because they had been hired after April 1, 1980, but the former DMW employees had never been Respondent's employees so they were terminated for that reason.

City driver John Jones, whom I credit, testified that on August 5 he and two other city drivers spoke to Bock. They inquired as to whether they would be rehired. Bock said the main office had instructed him not to rehire them. They asked for a job application blank but Bock refused to give them applications. On or about August 12 or 14, these same three drivers again spoke with Bock. They asked for a job application blank, which Bock gave them. They asked if they would be considered for employment if they filled out the applications. Bock then showed them a notepad with questions and answers. He specifically showed them the question, "Will former employees be rehired?" and the answer, "No."<sup>7</sup>

Jones also testified that on Monday, August 3, he and two other city drivers went to the terminal to see if they would be allowed to work. The dock foreman told them he had been instructed that they were not to go on the premises.

On August 3, by mailgram addressed to Pazik, Teamsters Local 17 made the following request for information:

DR. MR. PAZIK, LOCAL 17 RECEIVED YOUR TELEGRAM OF JULY 30, 1981. SINCE THEN, WE ARE ADVISED THAT ALL FORMER DENVER MIDWEST EM-

<sup>6</sup> 46 Fed. Reg. 60, 19329 (1981).

<sup>7</sup> Jones testified that it was Bock's practice to write out questions before he telephoned the general office or headquarters and to write down the answers he received.

EMPLOYEE HAVE BEEN PLACED ON LAYOFF, BUT YOU ARE HIRING NEW EMPLOYEES. WE PROTEST THIS ACTION AND WILL HOLD THE COMPANY LIABLE FOR ALL LOST WAGES AND BENEFITS INVOLVED.

WE RESPECTFULLY REQUEST THAT WE BE PROVIDED THE FOLLOWING INFORMATION IMMEDIATELY: 1. COPY OF ORIGINAL AGREEMENT BETWEEN WINTZ AND DENVER MIDWEST, (EXCLUDING FINANCIAL TERMS, AT YOUR OPTION). 2. COPIES OF ALL AGREEMENTS BETWEEN WINTZ AND DENVER MIDWEST RELATING TO WINTZ'S ACQUISITION OF TERMINAL FACILITIES AND/OR EQUIPMENT. 3. A COPY OF ICC ORDER DENYING TEMPORARY AUTHORITY. 4. COPY OF ALL ICC APPLICATION MADE BY WINTZ SINCE MARCH 1, 1981, INCLUDING COPY OF ANY PRESENTLY EFFECTIVE TEMPORARY AUTHORITY. MUST HAVE ABOVE TO EVALUATE LEGALITY OF YOUR ACTIONS UNDER CONTRACT AND NATIONAL LABOR RELATIONS ACT.

No response was ever received from Respondent.

On August 4, by mailgram addressed to Pazik, Teamsters Local 961 made the following request for information:

LOCAL 961 RECEIVED YOUR TELEGRAM OF JULY 30, 1981. SINCE THEN WE ARE ADVISED THAT ALL FORMER DENVER MIDWEST EMPLOYEES HAVE BEEN PLACED ON LAYOFF, BUT YOU ARE HIRING NEW EMPLOYEES. WE PROTEST THIS ACTION AND WILL HOLD THE COMPANY LIABLE FOR ALL LOST WAGES AND BENEFITS INVOLVED. RESPECTFULLY REQUEST THAT WE BE PROVIDED THE FOLLOWING INFORMATION IMMEDIATELY:

1. COPY OF ORIGINAL AGREEMENT BETWEEN WENTZ [sic] AND DENVER MIDWEST (EXCLUDING FINANCIAL TERMS AT YOUR OPTION) 2. COPIES OF ALL AGREEMENTS BETWEEN WENTZ [sic] AND MIDWEST RELATING TO WENTZ'S [sic] ACQUISITION OF TERMINAL FACILITIES AND/OR EQUIPMENT 3. COPY OF ICC ORDER DENYING THE TA 4. COPY OF ALL ICC APPLICATIONS MADE BY WENTZ [sic] SINCE MARCH 1, 1981 INCLUDING COPY OF ANY PRESENTLY EFFECTIVE TA MUST HAVE ABOVE TO EVALUATE LEGALITY OF YOUR ACTIONS UNDER CONTRACT AND NLRA

No response was ever received from Respondent.<sup>8</sup>

On August 21, by certified mail addressed to Bock, the OPEIU Local 5 steward filed a grievance with Respondent, the body of which reads:

This grievance is being filed for and on behalf of all Local #5 members employed by Wintz Motor Freight, Inc.

The union is charging that Wintz Motor Freight, Inc. is violating the successors clause, Article XXIII.

And further charges Wintz Motor Freight, Inc. is violating seniority Article VI.

<sup>8</sup> Grievances had been filed with the Unions concerning the terminations.

And lastly, the union is asking that these people be made whole for all wages and benefits lost during this termination.

Per grievance [sic] procedure, Article XXIX, Section B, we request a written reply to above grievance [sic] to local #5 within 5 days of receipt of this grievance [sic].

Respondent never made any response.

At some time prior to November 17, the city drivers and dockworkers were terminated and the work previously performed by them, including the work on the Wintz Transportation dock, was subcontracted out to Action Cartage Company. Neither Teamsters Local 17 nor the Teamsters National Union Committee was ever given prior notice, or an opportunity to bargain with Wintz Motor Freight or Wintz Transportation Company with regard to this subcontracting. Subsequently, Teamsters Local 17 filed a grievance protesting the subcontracting and a hearing was held on the grievance. During the hearing, according to the credited testimony of Harry Marshall, Pazik testified that Wintz Transportation city drivers and dockworkers performed the same work as had the city drivers and dockworkers in the employ of Wintz Motor Freight and that Action Cartage was performing the same work as had been done previously by Wintz Transportation Company and Wintz Motor Freight.

#### Conclusion

The record clearly establishes that Wintz Motor Freight continued to operate the same business at the same location with the same employees, same supervision, same equipment, and the same customers as DMW. Thus it continued as the same employing industry as DMW and, as such, was a successor to DMW obligated to recognize and bargain with the Unions which represented the employees of DMW in the various appropriate units. In fact, Wintz Motor Freight never disputed this obligation. Rather, it recognized the Unions and adopted their collective-bargaining agreements with DMW. The issues herein arise out of the takeover by Wintz Transportation Company of the operations of the business previously operated by Wintz Motor Freight and DMW and its refusal to assume the obligations that flowed from Wintz Motor Freight's status as a successor to DMW.

The General Counsel contends that this refusal was unlawful. I agree, for Wintz Motor Freight did not cease its operations. Rather, the same business operations were continued without hiatus at the same location with the same supervision, the same equipment, and the same persons controlling labor relations.<sup>9</sup> Furthermore, as late as September, the name on the trucks had not been changed from Wintz Motor Freight. In these circumstances, and in view of the evidence that Wintz Transportation Com-

<sup>9</sup> As set forth below, Wintz Motor Freight unlawfully discharged all of its terminal clericals, its city drivers and dockworkers and all but two of its over-the-road drivers. Were it not for these unlawful discharges, Wintz Transportation Company would have continued operations with the same employees also.

pany was one of the purchasing entities along with Wintz Motor Freight that entered into the agreement to purchase DMW's assets and interstate operating authority; that several months prior to July 31, Wintz Transportation Co. was substituted for Wintz Motor Freight as the applicant for authority to purchase the interstate operating rights and property of DMW; that G. Wintz told employees he was going to combine Wintz Motor Freight with Wintz Transportation so he could move funds from one company to the other; and that G. Wintz is the sole director of both companies; I conclude that Wintz Transportation Company and Wintz Motor Freight, herein referred to collectively as Respondents, are *alter egos*. *Farmingdale Iron Workers, Inc.*, and *Jerry Cardullo Iron Workers, Inc.*, 249 NLRB 98 (1980).

However, notwithstanding the relationship between Wintz Motor Freight and Wintz Transportation Company and the continuance of the operation of the business without hiatus or substantial change, Respondent terminated, and refused to accept employment applications from or to rehire or consider for rehire, all of its employees who had been in the employ of DMW in units represented by the Unions,<sup>10</sup> while retaining its unrepresented employees who had previously been in the employ of DMW. Such disparate treatment warrants an inference of unlawful motivation. Further, such discrimination against represented employees is inherently destructive of important employee rights and, as such, is violative of Section 8(a)(3) and (1) of the Act.<sup>11</sup> *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *Borg Warner Corporation, et al.*, 245 NLRB 513, 519 (1979).

As an *alter ego* of Wintz Motor Freight, Wintz Transportation Company had an obligation to recognize and bargain with the Unions, to honor the collective-bargaining agreements adopted by Wintz Motor Freight, and to honor the noncontractual conditions of employment of unit employees. Yet Respondent terminated almost all unit employees, allegedly for business reasons, without giving the Union an opportunity to bargain prior to the implementation of such action. By such conduct, Respondent violated Section 8(a)(5) and (1) of the Act. *Sun-Maid Growers of California*, 239 NLRB 346 (1978); *The Lange Company, a Division of Garcia Corporation*, 222 NLRB 558 (1976); *R. C. Cobb, Inc.*, 231 NLRB 99 (1977).

Respondent further violated Section 8(a)(5) and (1) of the Act by refusing to process the grievance filed by OPEIU Local 5 concerning the discharge of the terminal clerical employees. *American Gypsum Company*, 231 NLRB 1291 (1977); *Campo Slacks, Inc. and J & E Sportswear, Inc.*, 250 NLRB 420 (1980). Also, by refusing to furnish the information requested by Teamsters Locals 961 and 17, Respondent violated Section 8(a)(5) and (1)

of the Act. Such information is clearly relevant and necessary to the Unions' performance of their representative obligations and to the processing of grievances relating to the discharge of unit employees. See *Designcraft Jewel Industries, Inc.*, 254 NLRB 791 (1981); *Otis Elevator Company, a wholly owned subsidiary of United Technologies*, 255 NLRB 235 (1981); *Safeway Stores, Inc.*, 252 NLRB 682 (1980); *Westwood Import Company, Inc.*, 251 NLRB 1213, 1226 (1980).

Finally, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting all of its local cartage work, thereby eliminating an entire segment of the bargaining unit, without giving advance notice to Teamsters Local 17 or affording it an opportunity for bargaining as to such change and the effects thereof. *Blue Grass Provision Co., Inc.*, 238 NLRB 910 (1978).

#### CONCLUSIONS OF LAW

1. Denver Midwest Motor Freight and Wintz Motor Freight, Inc., and Wintz Transportation Company and its Trustee in Bankruptcy William Westphal are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Wintz Transportation Company and Motor Wintz Freight, Inc., herein called Respondent, are *alter egos* and a single employer within the meaning of the Act; and its Trustee-in-Bankruptcy William Westphal is a successor in bankruptcy to Respondent.

3. OPEIU Local 5, the Teamsters National Union Committee, Teamsters Local 17, and Teamsters Local 961 each is a labor organization within the meaning of Section 2(5) of the Act.

4. All office and clerical employees formerly employed by DMW and presently employed by Respondent at its Commerce City warehouse, but excluding General Office clerical employees, sales persons, guards, professional employees, confidential employees, all over-the-road drivers, city drivers and warehouse employees, and casual part-time employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

5. All over-the-road drivers, city drivers, dock and warehouse employees employed by employers and employer-members of associations who are signatory to the Teamsters National Master Freight Agreement, but excluding office clerical employees, sales persons, guards, professional employees, and supervisors as defined in the Act constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times material herein, the OPEIU Local 5 has been the designated exclusive collective-bargaining representative of the employees in the unit described above in paragraph 4.

7. DMW and OPEIU Local 5 have been signatories to successive collective-bargaining agreements covering DMW's employees in the unit described above in paragraph 4, the most recent of which is effective by its terms for the period October 1, 1979, to October 1, 1982.

<sup>10</sup> The only represented employees retained were the two over-the-road drivers hired subsequent to Wintz Motor Freight commencing the operation of the business. Apparently Respondent's position was that it was only terminating DMW employees.

<sup>11</sup> The only evidence relating to a business justification for the terminations is Respondent's claim, set forth in the July 30 communications, that its temporary authority to operate had been rescinded. The sufficiency of this claim as a business justification for Respondent's conduct is belied by the fact that Respondent did continue its operations following the terminations.

8. DMW and the Teamsters National Union Committee, Teamsters Local 17, and Teamsters Local 961 have been signatories to successive collective-bargaining agreements covering DMW's employees in the unit described above in paragraph 5, the most recent of which are effective by their terms for the period April 1, 1979 to March 31, 1982; Teamsters Local 961 has been the Local Union designated to service the over-the-road drivers in said unit, and Teamsters Local 17 has been the Local Union designated to service the city drivers, dock, and warehouse employees in said unit.

9. At all times material herein, the Teamsters National Union Committee, Teamsters Local 17, and Teamsters Local 961 have been the joint exclusive collective-bargaining representative of Respondent's employees in the unit described above in paragraph 5.

10. Since April 1, 1980, Respondent has engaged in business operations as a successor of DMW and has adopted DMW's collective-bargaining agreements described above in paragraphs 7 and 8.

11. By failing and refusing to meet and bargain with OPEIU Local 5 concerning wages, hours, and other terms and conditions of employment of employees in the unit described above in paragraph 4; by discharging the employees in said unit without advance notice to or bargaining with OPEIU Local 5; and by failing and refusing to process a grievance relating to said discharges, Respondent has violated Section 8(a)(5) and (1) of the Act.

12. By failing and refusing to meet and bargain with Teamsters Local 17 and Teamsters Local 961 concerning wages, hours, and other terms and conditions of employment of its employees in the unit described above in paragraph 5; by discharging employees in said unit without advance notice to or bargaining with the Teamsters National Union Committee and/or Teamsters Local 17 and Teamsters Local 961; and by failing and refusing to provide information requested by Teamsters Local 17 and Teamsters Local 961 which is relevant and necessary to their performance of their representative obligations and to the processing of grievances relating to said discharges, Respondent has violated Section 8(a)(5) and (1) of the Act.

13. By unilaterally subcontracting all of its local cartage work without advance notice to or bargaining with Teamsters Local 17, Respondent has violated Section 8(a)(5) and (1) of the Act.

14. By discharging and refusing to accept employment applications from, or to rehire or consider for rehire, all of its represented employees who had been in the employ of DMW while retaining its unrepresented employees who had previously been in the employ of DMW, Respondent has violated Section 8(a)(3) and (1) of the Act.

15. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Wintz Transportation Company is the *alter ego* of Wintz Motor Freight, Inc., and having found that they have engaged in certain unfair labor practices, I shall recommend that Respondent and its

trustee-in-bankruptcy cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discharged certain of its represented employees in violation of Section 8(a)(3) and (5) of the Act, I shall recommend that Respondent offer to each of such discharged employees reinstatement to his or her former, or substantially equivalent, position without prejudice to his or her seniority or other rights and privileges, discharging, if necessary, any replacement who may have been hired or assigned or contracted to perform the work previously performed by said discharged employee. With regard to the local cartage work, previously performed by the city drivers, dockmen, and warehousemen, since I have found that such work was unilaterally subcontracted by Respondent in violation of Section 8(a)(5) of the Act and since the Board has long recognized that no genuine bargaining over a decision to terminate a phase of operations can be conducted where that decision has already been made and implemented, and inasmuch as such work is being performed by the subcontractor at the same location as it had been performed by the discharged employees and the record does not disclose that this change involved any change in capital structure or reinvestment of funds, restoration of the status quo would not appear to involve any undue economic hardship. Accordingly, I shall recommend that Respondent restore its local cartage operations. *Syufy Enterprises, a Limited Partnership*, 220 NLRB 738 (1975); *Sun-Maid Growers of California*, 239 NLRB 346.

I shall further recommend that Respondent and its trustee-in-bankruptcy make whole each of said discharged employees for any loss of wages or other benefits he or she may have suffered by reason of such discharge. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977). Respondents will also be ordered to pay to the appropriate funds such contributions as are required by the collective-bargaining agreements, with interest.

As the unfair labor practices committed by Respondents are of a character striking at the very heart of the Act, I shall recommend that Respondent and its trustee-in-bankruptcy be ordered to cease and desist from infringing in any other manner upon the rights guaranteed in Section 7 of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>12</sup>

The Respondent, Wintz Motor Freight, Inc., Wintz Transportation Company, and its Trustee-in-Bankruptcy

<sup>12</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.



William Westphal, Commerce City, Colorado, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to meet and bargain with OPEIU Local 5, and with the Teamsters National Union Committee and/or Teamsters Local 961 and Teamsters Local 17 as the exclusive bargaining representative of its employees in the respective appropriate unit with respect to wages, hours, and other terms and conditions of employment; from refusing to process grievances or to provide information requested by said collective-bargaining representatives which is relevant and necessary to their performance of their representative obligations; and from unilaterally discharging employees; subcontracting unit work or otherwise changing the wages, hours, and other terms and conditions of employment of the aforementioned unit employees without prior bargaining with the appropriate above-named unions or any other labor organization its employees may select as their exclusive bargaining representative. The appropriate units are:

All office and clerical employees formerly employed by DMW and presently Employed by Respondent at its Commerce City warehouse, but excluding General Office clerical employees, sales persons, guards, professional employees, confidential employees, all over-the-road drivers, city drivers and warehouse employees, and casual part-time employees and supervisors as defined in the Act.

All over-the-road drivers, city drivers, dockmen and warehouse employees employed by employers and employer-members of associations who are signatory to the Teamsters National Master Freight Agreement, but excluding office clerical employees, sales persons, guards, professional employees, and supervisors as defined in the Act.

(b) Discouraging membership in the above-named unions, or any other labor organization, by discharging, and refusing to accept employment applications from, or to rehire or consider for rehire, its represented employees while retaining its unrepresented employees.

(c) In any other matter interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is deemed to be necessary to effectuate the policies of the Act:

(a) Upon request, recognize and bargain collectively with OPEIU Local 5 and with the Teamsters National Union Committee and/or Teamsters Local 961 and Teamsters Local 17, respectively, as the collective-bargaining representative of its employees in the above-described bargaining units.

(b) Furnish Teamsters Local 17 and Teamsters Local 961 the information requested by them respectively on August 3, and 4, 1981.

(c) Reinstitute its local cartage operation as it existed on July 31, 1981.

(d) Offer to all employees in the above-described appropriate units who were discharged on July 31, 1981, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay or benefits suffered by them in the manner set forth in the above section entitled "Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the moneys due under the terms of this Order.

(f) Post at the facility in Commerce City, Colorado, copies of the attached notice marked "Appendix."<sup>13</sup> Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's and Respondent's Trustee's representative, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent and Respondent's Trustee to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>13</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."